Annual Report

BC Human Rights Tribunal

2003-2004

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LETTER TO THE ATTORNEY GENERAL

British Columbia Human Rights Tribunal

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May 17, 2004

Honourable Geoff Plant
Attorney General
Province of British Columbia
Room 232
Parliament Buildings
Victoria, BC V8V 1X4

Dear Attorney General:

It is my pleasure to present the first Annual Report from the BC Human Rights Tribunal covering the period April 1, 2003, to March 31, 2004.

This report has been prepared in accordance with section 39.1 of the *Human Rights Code*.

Yours truly,

Heather M. MacNaughton
Chair

HM/sor

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Message from the Chair

2003/2004 Annual Report is the First Report of the Human Rights Tribunal

Amendments to the *Human Rights Code* were proclaimed in force on March 31, 2003. They established the Tribunal as the first direct access human rights tribunal in Canada. The report that follows sets out the work of the Tribunal over the past year at each stage of the new process.

There were a number of challenges facing us in our first year of operation. These included the short lead up time in which to implement the changes; the over 300 cases transferred to us from the Commission, immediately following its closure; and the on-going work demands for the existing Tribunal. In addition, the Tribunal received 1,145 new complaints in the year.

Staffing was slower than expected and some positions were not filled until September. Staff were trained in the new process and a new statute at the same time as they were dealing with a large number of complaints.

Despite those challenges, the Tribunal has met and exceeded delivery expectations. There have been several notable successes:

1. The Tribunal concentrated its early efforts on communicating with the participants in the cases transferred from the Commission and in making its new process clear and understandable. We made extensive use of our Web site to provide the public with information about the new process. Tribunal staff have spoken and presented at numerous events, providing information about the new human rights system.

2. Our guides and information sheets were prepared in clear language and have been well received by their target audiences. They are available in Chinese and Punjabi in both hard copy and electronically.

3. The Tribunal, after consultation, published detailed *Rules of Practice and Procedure* governing each stage in our process.

4. The Tribunal, with the assistance of staff in the Attorney General's ministry, and an outside systems development company, was able, in 45 days, to design and implement a functional case management system. That system was refined throughout the fiscal year.

5. The Tribunal provided mediation to the parties in more than 245 complaints. In many cases, the parties opted for an early settlement meeting, following the filing of a complaint, but before a response was filed.

6. Through 310 decisions, 160 of which were reported, the Tribunal is establishing a body of jurisprudence which will assist the public and advocates appearing before us to interpret and apply the *Code* and to understand the rights and responsibilities under it.

7. As the year progressed, we modified the Tribunal process to address unexpected results and issued practice directions and information sheets to explain our process. The complaint forms were amended to better reflect the grounds and section pairings in the *Code*.

8. In the fall, the Tribunal arranged for the human rights clinic and representatives of the respondents' bar to provide on-site assistance to the parties in our process.

9. The Tribunal prepared and published a special programs policy and communicated with all the organizations who had received special programs approval from the former Commission outlining the new policy and advising what was required of them.

10. The Tribunal closed in excess of 600 cases.

The Year Ahead

The information provided in this first annual report will convey the extent of the work undertaken to successfully implement the direct access model for human rights in British Columbia. In the future, we look forward to more stability for human rights in the province, to allow evaluation of the success of the model itself as the Tribunal and the public gain experience with it.

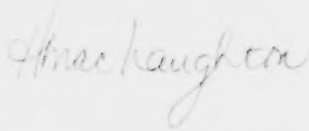
In the next year, the Tribunal expects that there will be further legislative amendments arising from the Administrative Justice Project of the Ministry of the Attorney General. We hope to undertake this work in conjunction with our review of the Tribunal's rules and processes after its first year of operations. In November 2003, I announced the first review and sought input from our user community. We will be amending our process, rules and forms in light of this input and any further legislative amendments.

Together with the University of British Columbia, the Tribunal will be conducting a user survey of its alternate dispute resolution practices. The Tribunal will also publish its mediation policy explaining to the public what services we offer and what they can expect of the process.

We begin our second year of operations with new processes and systems in place and a fully staffed and trained Tribunal. With the challenges of setting up a new system largely behind us, we will focus on the continuing challenge of providing effective human rights services in the province.

Thank You

I take this opportunity to thank all those external and internal to the Tribunal who assisted us in establishing our new processes, who worked diligently and with commitment to bring us to where we are today, and who continue those efforts ongoingly.



Heather M. MacNaughton
Chair

CHANGES TO THE BC HUMAN RIGHTS SYSTEM

Before March 31, 2003, human rights services in British Columbia were delivered by three agencies: the B.C. Human Rights Commission, the B.C. Human Rights Tribunal, and the Human Rights Advisory Council.

Commission responsibilities were divided among three commissioners: The Chief Commissioner was responsible for public education and, with the Deputy Chief Commissioner, could hold hearings and consultations, and conduct research; The Deputy Chief Commissioner could also initiate human rights complaints and participate in complaints filed by others; The Commissioner of Investigation and Mediation was responsible for receiving, investigating, and mediating complaints, and deciding which complaints would be referred to the Tribunal for hearing.

The Advisory Council informed the public about the Commission's work, ensured the Commission was aware of the public's concerns, and advised the Commission and Minister.

The Tribunal processed those cases referred to it by the Commissioner of Investigation and Mediation under *Rules of Practice and Procedure*, which provided for mediation, pre-hearing preparation and the hearing process. Under the *Code*, the Tribunal's principal role was adjudicative: The Tribunal held hearings to determine whether complaints were justified, and, if so, ordered appropriate remedies.

On March 31, 2003, the *Human Rights Code Amendment Act, 2002* was proclaimed. It eliminated the Commission and Advisory Council, leaving the Tribunal as the sole independent agency through which human rights services were delivered. Complaints were to be directly filed and resolved at the Tribunal without investigation. The Ministry of the Attorney General assumed responsibility for public education and information, research and consultations, and funded human rights clinics to provide services to complainants and respondents in the human rights process.

In addition to changing the structure of the human rights system in B.C., the amendments to the *Code* reduced the time limit for filing complaints from one year to six months. The amendments also changed the purposes of the *Code* by eliminating the goals of monitoring the progress of achieving equality in B.C. and creating mechanisms for providing the information, education and advice necessary to achieve the other purposes of the *Code*.

PREPARATION AT THE TRIBUNAL

Planning for the changes at the Tribunal took place over a very short period of time. It included designing the first direct access human rights model in Canada, locating new office space, hiring and training staff, and creating a new case management system to handle the increase in workload. The Tribunal undertook a number of critical initiatives:

RULES OF PRACTICE AND PROCEDURE AND FORMS

The Tribunal prepared and published draft *Rules of Practice and Procedure*. The *Rules* were designed to be comprehensive, setting out each step of the process under the new direct access system, so that the general public and the participants before the Tribunal would know what to expect, and the Tribunal could effectively manage its caseload.

The Tribunal's goal was to ensure that once parties were in the process, they would be advised of each next step and what would be required of them. The *Rules* also included the use of forms for many aspects of the process, from filing and responding to complaints to making applications or settlement.

The Tribunal requested public comments on the draft *Rules* in December 2002. After submissions, the *Rules* and forms were revised, and came into effect on March 31, 2003.

Guides and Information Sheets

To assist the public in understanding the new human rights process, the Tribunal developed five guides covering the main aspects of the process: **1** The *BC Human Rights Code* and Tribunal; **2** Making a Complaint; **3** Responding to a Complaint; **4** The Settlement Meeting; and **5** Getting Ready for a Hearing.

The Tribunal also published numerous information sheets, covering such topics as the *Rules of Practice and Procedure* and *How to Make an Application*.

Government Agents

To increase public access to the Tribunal outside of the Lower Mainland, the Tribunal entered into an agreement with the Government Agents Office. Located throughout BC, they could distribute information about the Tribunal and provide locally accessible mail, internet and faxing services to persons using the Tribunal's services.

Tribunal Web Site

The Tribunal redesigned and expanded its Web site to include the new *Code* and *Rules of Practice and Procedure*, forms, guides, information sheets, practice directions, hearing schedules, decisions, the status of judicial reviews, biographies of members, and special programs policy.

Case Management System

In consultation with a software developer, the Tribunal developed and implemented a case management database system to track complaints through the process. Its capabilities included bring forward and scheduling functions, the generation of form letters and documents, and the creation of management reports to monitor processing and workflow.

Staff and Members

The Tribunal hired a registrar, four additional case managers, two inquiry officers, an executive assistant to the chair, a receptionist, a special projects coordinator and legal counsel. The Lieutenant Governor-in-Council appointed an additional four full-time members.

For the first few months before the Tribunal was fully staffed, the Tribunal relied on Enquiry BC to handle calls from the public and refer them to the Tribunal or other resources as appropriate. Training of most staff occurred at the same time that the Tribunal was beginning to operate the new system.

Consultations with Commission

The Tribunal consulted with the Commission to determine the number, status and contents of files to be transferred to it on March 31, 2003.

The New Model Goes Into Operation

On March 31, 2003, the Tribunal began operation under the new system. On that day the Tribunal had approximately 200 complaints that had been referred to it by the Commission under the former legislation, about 30 of which were referred in its last week of operation.

Also on March 31, 2003, the Commission transferred approximately 180 open complaint files and 120 unprocessed complaints to the Tribunal. Most of the transferred complaints were at an early stage, and had not yet been served on the respondents or investigated.

The Tribunal contacted complainants who had recently made complaints to the Commission to advise them of the new process and to determine whether they wanted to proceed with a complaint. Many of these complainants then initiated complaints with the Tribunal.

In many of the 180 open complaints transferred to the Tribunal, the respondents had not yet been notified. The Tribunal served these complaints, requesting that the respondent file a response to the complaint. For the complaints that had already been served on the respondents by the Commission, the Tribunal assigned members to hold pre-hearing conferences to determine how best to proceed.

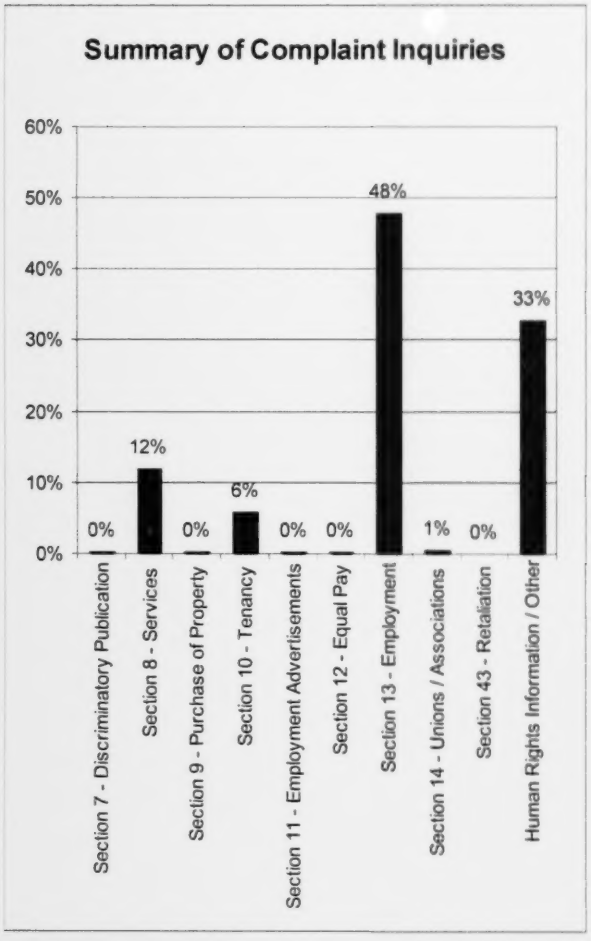
Finally, the Commission had placed some complaints in deferral pending the outcome of another proceeding. The Tribunal contacted those parties to determine the status of the other proceeding, whether they wanted to remain in deferral pending the outcome of the other proceeding, or whether the complaint should proceed.

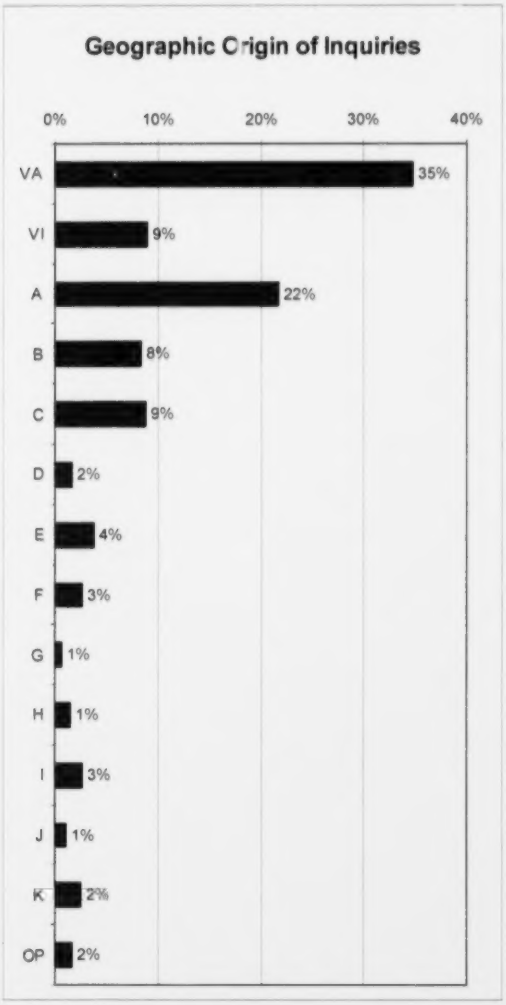
By the end of April, 2003, the Tribunal had contacted the parties in all of the transferred complaints. The Tribunal also began directly accepting complaints under the new *Code* as of March 31, 2003. This process is described in the next sections.

Inquiry Statistics

The Tribunal has two inquiry officers who give basic information about the human rights protection provided by the *Code*. They also explain the complaint process and may provide contact information for other organizations providing assistance in human rights matters. In the Tribunal's first year, it received over 18,100 calls, averaging about 72 inquiries per day.

Complaint forms, guides and information sheets are available at the Tribunal, on its Web site, at government agents' offices, the Human Rights Clinic and other organizations.





VA	Vancouver
VI	Victoria
A	Lower Mainland (Excluding Vancouver)
B	Vancouver Island & Gulf Islands (Excluding Victoria)
C	Okanagan
D	Rocky Mountains
E	Squamish / Kamloops
F	Kootenays
G	Sunshine Coast
H	Cariboo
I	Prince George Area
J	Skeena
K	Northern BC
OP	Out of Province

Filing and Screening of Complaints

Filing of Complaints

The first step in the complaint process is the filing of a complaint form with the Tribunal by mail, fax, or hand delivery. The filing of complaints by email is not yet operational, but is an option that the Tribunal intends to provide to users of its process in the future.

Screening: Jurisdiction, Completeness and Time Limits

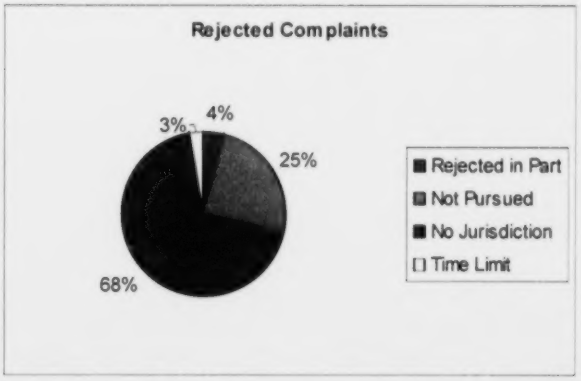
When a complaint is filed, a case manager reviews the form to see that it is complete, apparently within the jurisdiction of the Tribunal, and filed within the 6-month limitation period. Screening is an important function and intensive training of case managers took months to complete. In the last year, the Tribunal received 1,145 complaint forms of which 947 were eventually accepted. The screening process is as follows:

1. Completeness: If the complaint form is not complete, the case manager will outline the deficiency and give the complainant a limited time to properly complete it.

2. Jurisdiction: If it is clear that the complaint does not involve a BC matter or a human rights matter covered by the *Code*, the case manager will recommend to the chair that the complaint be rejected.

3. Time Limit: The *Code* sets out a 6-month time limit for filing complaints, calculated from the date of the alleged contravention of the *Code* or the date of the last alleged instance of a continuing contravention. The *Code* also gives the Tribunal discretion to accept late complaints if is in the public interest to do so and no substantial prejudice will result to any person because of the delay.

If it appears that the complaint was filed after the 6-month time limit, the case manager ensures that the complainant has filled out the part of the complaint form dealing with late complaints. The case manager notifies the respondent of the complaint, and gives them an opportunity to argue that the late complaint should not be accepted. The complainant has an opportunity to reply. Then a Tribunal member, designated by the chair, decides whether to accept all or part of a late complaint.



Time Limit Decisions

In the last year, the Tribunal made 18 reported and 25 unreported decisions on applications to accept complaints filed after the time limit, most of which related to the reduction in the limitation period from 1 year to 6 months. Some of the rulings follow:

A continuing contravention involves acts of discrimination of the same character that could be considered as separate contraventions; it is not merely one act of discrimination which may

have continuing effects (*Rai v. Annacis Auto*, 2003 BCHRT 31; *Wadhera v. Teamsters Local 213*, 2003 BCHRT 85).

The limitation period is a substantive provision intended to ensure that complainants pursue their human rights remedies with some speed and to allow respondents the comfort of performing their activities without the possibility of dated complaints. Whether it is in the public interest to accept a late complaint is to be decided in light of the purposes of the *Code* as set out in s. 3 and will depend on the circumstances of each case (*Chartier v. School District No. 62*, 2003 BCHRT 39).

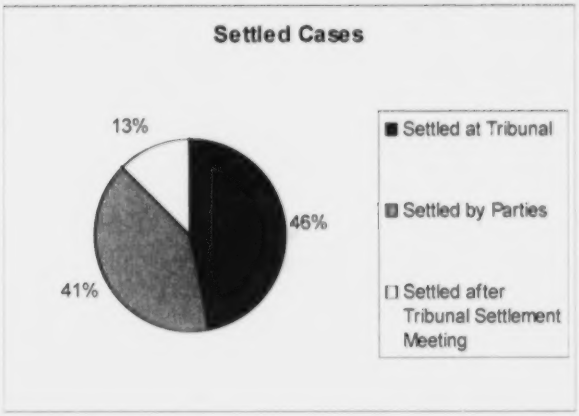
Factors that may be considered when deciding whether to accept late complaints include the effect of the transition in the human rights system, especially in the absence of any substantial prejudice to the respondents (*Blank v. Lapointe and Cultus Lake Park Board*, 2003 BCHRT 54), and the mental and physical incapacity of a complainant (*Ainscough v. Canada Safeway and UFCW Local 1518*, 2003 BCHRT 46).

Notification of Accepted Complaint

After screening a complaint, the Tribunal notifies the parties that the complaint has been accepted.

Early Settlement Meeting Option

Before any further step is taken in the complaint process, the parties may choose to meet with a mediator from the Tribunal who will assist them to resolve the complaint. In the first year of operations, the parties chose an early settlement meeting in more than 120 cases, and more than 70% of those resolved at this stage.



Response to Complaint Filed

If the parties do not settle or do not want an early settlement meeting, the respondent files a response to complaint form and may also file an application to defer or dismiss the complaint.

Applications for Deferral or Dismissal

If a respondent applies to have the complaint deferred or dismissed, the Tribunal requests submissions from the parties and a Tribunal member, designated by the chair, makes a decision. Complaints may be deferred if another proceeding is capable of appropriately dealing with the substance of the complaint. Complaints may be dismissed for a variety of reasons specified in s. 27(1) of the *Code*.

Tribunal Decisions on Applications to Defer Complaints

The Tribunal's power to defer the hearing of a complaint under s. 25 of the *Code* is new to it. Previously, the Commission determined whether a complaint should be deferred and some of the files transferred from the Commission to the Tribunal had been deferred. The Tribunal wrote to the parties in each of

those cases to determine the status of the other proceedings. Some continue to be deferred.

In the first year of its operations, the Tribunal decided 9 applications respecting the deferral of complaints pending another proceeding, including 1 application to set aside a deferral. The other proceedings were grievances, arbitrations and civil actions. The Tribunal ordered deferral in 4 cases and permitted deferral to continue for a time-limited period in 1 case. Two decisions by the Tribunal established the following:

A deferral is only in the nature of a temporary stay of proceedings. Some of the relevant factors in the exercise of the Tribunal's discretion include the subject matter and nature of the other proceeding, the adequacy of the remedies available in the other proceeding, the fairness to the parties of a deferral of the complaint and the timeliness of the resolution of the human rights issue, including whether the other proceeding has begun or is scheduled to begin and when (*Young v. Coast Mountain Bus Company Ltd.*, 2003 BCHRT 28).

The Tribunal has jurisdiction to revisit a deferral decision in appropriate circumstances, whether the deferral was ordered by it or by the Commission (*Kroeplin v. Fraser Health Authority*, 2003 BCHRT 70).

TRIBUNAL DECISIONS ON APPLICATIONS TO DISMISS COMPLAINTS

The Tribunal may dismiss all or part of a complaint, with or without a hearing, under s. 27(1) of the *Code*. This is a new power for the Tribunal, previously exercised by the Commission in its role of screening complaints to determine which should be referred for a hearing. The various grounds for dismissing a complaint at an early stage remain the same as under the old system, with the exception that the Tribunal can dismiss if there is no reasonable prospect that the complaint will succeed.

In its first year of operation under the new system, the Tribunal decided 39 applications to dismiss a complaint under s. 27(1), of which 25 were granted in whole or part. It became apparent part way through the year that many respondents were filing dismissal applications prematurely. In response, the chair issued a practice direction regarding the time for filing applications and the Tribunal issued an information sheet regarding the grounds for dismissal. Some of the rulings under various grounds are set out below:

SECTION 27(1)(a): JURISDICTION

The Tribunal, as a creature of provincial legislation, has no jurisdiction over a respondent who is subject to federal regulation under the *Constitution Act, 1867*, such as a telecommunications undertaking (*Chan v. Bell Mobility Inc. dba Bell Mobility*, 2003 BCHRT 27).

The Nisga'a Nation and the institutions established pursuant to the Nisga'a Final Agreement are within federal jurisdiction with respect to human rights (*Asak v. Nisga'a Nation and others; Robinson and Lincoln v. Nisga'a Nation and others*, 2003 BCHRT 79).

SECTION 27(1)(b): NO CONTRAVENTION OF THE *CODE*

A decision on an application to dismiss a complaint on the basis that it does not allege a contravention of the *Code* should be made on the

basis of facts assumed to be true, based either on the complainant's statements or an agreed statement of facts between the parties (*Pegura v. Surrey School District No. 36*, 2003 BCHRT 53).

All the circumstances must be taken into account when considering whether a single comment could constitute a contravention of the *Code*. Some relevant factors would be the egregiousness or virulence of the comment, the nature of the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether the recipient of the comment was a member of a group historically discriminated against (*Pardo v. Coquitlam School District No. 43*, 2003 BCHRT 71).

There is no contravention of the *Code* where a complainant, not acting in a representative capacity, alleges that another person was subject to discrimination (*Grant and Smith v. B.C. (Min. of Public Safety)*, 2003 BCHRT 72).

Section 27(1)(c): No reasonable prospect of success

A party applying to have a complaint dismissed on the basis that there is no reasonable prospect of success must provide the Tribunal with sufficient information upon which a member could draw that conclusion (*Bell v. Dr. Sherk and others*, 2003 BCHRT 63; *McMurchie v. London Drugs Ltd.*, 2003 BCHRT 82).

The Tribunal determined that while a complainant was discriminated against for her political beliefs, there was no reasonable prospect that the complaint would succeed because the complainant would not be able to rebut a *bona fide* occupational requirement of neutrality for her employment (*Travena v. Citizens' Assembly on Electoral Reform and others*, 2004 BCHRT 24).

Section 27(1)(d): Proceeding would not benefit the person, group or class discriminated against or would not further the purposes of the *Code*

The death of a complainant does not necessarily mean that there is no one allegedly discriminated against who may benefit from the proceedings, especially where the complaint is serious, may have a systemic aspect and considerable resources have been put into it (*Gregoire v. B.C. (Min. of Public Safety)*, 2004 BCHRT 25).

The Tribunal can dismiss a complaint as not furthering the purposes of the *Code* where a complainant has refused to accept a reasonable settlement offer. However, there must be an offer that is not subject to privilege and a sufficient factual basis for assessing the reasonableness of the offer (*Dar Santos v. University of British Columbia*, 2003 BCHRT 73).

Section 27(1)(e): Complaint made in bad faith or for improper motives

An angry letter written by the complainant after losing her job did not show that the complaint should be dismissed as being filed for improper motives or in bad faith (*Bell v. Dr. Sherk and others*, 2003 BCHRT 63).

Pre-Hearing Management

Section 27(1)(f): Complaint appropriately dealt with in another proceeding

A portion of a complaint subject to a completed grievance was dismissed given that the grievance dealt with the substance of the human rights allegations, arose from the same facts, and was withdrawn by the union from the next stage of proceedings after a thorough review to which the complainant took no exception (*Charbonneau v. Alcan Inc. and others*, 2004 BCHRT 19).

Section 27(1)(g): Alleged contravention outside of time limit

A complaint may be dismissed if it is filed outside of the time limit, subject to the Tribunal's discretion to accept the late complaint in the public interest under s. 22(3) (*Blank v. Lapointe and Cultus Lake Park Board*, 2003 BCHRT 54).

Streaming

Once a response to the complaint is filed and screened, the Tribunal decides whether the standard stream under the Tribunal's *Rules* is appropriate, or if the process will be case-managed by a Tribunal member. Most complaints follow the standard process, with the case-managed stream being used only for complaints that are particularly complex or which have other special characteristics.

Parties may ask for an expedited hearing that occurs within 3 months of filing if it is a short hearing. Parties can also request priority scheduling of hearing dates.

Settlement meeting

After the response to the complaint is filed, the parties are given another opportunity to take part in a settlement meeting with a Tribunal mediator. In the first year of the Tribunal's operations, more than 125 complaints were mediated at this stage, of which more than 70% settled. In total, over 250 cases settled through the Tribunal's settlement processes.

Pre-hearing preparation

If a complaint does not settle, the parties are required to exchange relevant documents, witness lists, and positions on remedy. A pre-hearing telephone conference also ensures that the parties are prepared for the hearing. Parties may bring applications to add a respondent, amend the complaint, or for an order that another party disclose relevant documents. Others may apply to intervene in the complaint.

Tribunal decisions on other preliminary applications

In 2003/2004, the Tribunal made 51 reported and unreported decisions on preliminary applications in addition to the applications to defer or dismiss a complaint and those related to the screening process. These decisions cover matters such as adjournments, intervenor status, amending a complaint, clarifying or limiting the scope of a complaint, adding a respondent, bifurcation and joinder, disclosure and independent medical examination. For example:

A respondent's application for adjournment was dismissed because the respondent had not acted in a timely way in obtaining legal advice and providing notice that it required the attendance of a doctor at the hearing. Moreover, the

respondent's concerns about the doctor's report could be addressed by means other than cross-examination of the doctor (*Barr v. Latte Da Café Ltd.*, 2003 BCHRT 65).

In a case where two groups unsuccessfully applied for intervenor status, one applicant failed to provide information that would enable the Tribunal to assess whether it could make a useful contribution to the issues raised in the complaint. It also did not appear that it would bring a different perspective to the issues than would the complainants themselves. The other applicant sought to raise issues well beyond the scope of the complaint, thereby taking the litigation away from the parties. In addition, the applicant had no particular expertise as it related to the issues in the case (*Cook and Warren v. Ministry of Education*, 2003 BCHRT 25).

It is not clear that the Tribunal has the jurisdiction to make an order that a complainant undergo an independent medical examination on application by the respondent. However, an examination was not required because there was sufficient documentary medical evidence to be disclosed. In addition, the respondent had not particularized the identity, expertise and number of experts that would be assessing the complainant (*Cucek v. Ministry of Children and Family Development*, 2003 BCHRT 44).

THE HEARING

Hearings are held before a member of the Tribunal or a panel of three members in exceptional cases. Most hearings are held at the Tribunal's office in Vancouver, but members travel regularly to do hearings in communities throughout BC

Hearings are conducted in person and are open to the public. The parties may represent themselves or be represented by an agent or lawyer. The Ministry of Attorney General has provided funding for human rights clinics to provide assistance to parties.

The parties provide evidence through witnesses, documents and other items. Expert evidence may be used where appropriate. Each party has the opportunity to challenge the other party's evidence and to make arguments supporting their positions.

DECISION

Based on the evidence, the arguments and the relevant law, a Tribunal member or panel decides whether the complainant has proven that discrimination occurred and, if so, whether the respondent has proven a defence to the discrimination. If the member or panel decides that the complaint is not justified, it is dismissed. If the complaint is justified, the member or panel makes orders to remedy the discrimination. Final decisions are reported on the Tribunal's Web site.

In 2003/2004, the Tribunal issued 23 final decisions. The Tribunal determined that the complaints were justified and ordered remedies in 15 of those complaints, and dismissed the other 8.

The amended *Code* does not provide for the monitoring of case resolutions at the Tribunal. However, a review of the 23 final decisions in the last year provides some information about the areas and grounds addressed in the hearings before the Tribunal.

Final Decisions

Areas of discrimination

The *Code* prohibits discrimination in 8 areas set out in sections 7 to 14, and also forbids retaliation against a person for filing, or other involvement in, a human rights complaint.

An area of discrimination is a circumstance or context in which discrimination is illegal. 17 of the 23 complaints were in the area of employment. 4 complaints dealt with services: a university graduate program, medical services, and services provided by strata corporations. 1 complaint involved a tenancy, and 1 of the employment complaints also dealt with an allegation of retaliation for filing a complaint. None of the complaints dealt with the areas of publication, purchase of property, employment advertisements, unions, or equal pay.

Grounds of discrimination

The *Code* prohibits discrimination on 15 grounds, though not every ground applies in each of the 8 areas of prohibited discrimination. The breakdown of final decisions by grounds of discrimination is as follows:

Sex Discrimination

9 final decisions concerned complaints of sex discrimination relating to pregnancy (3 cases), sexual harassment (5 cases), and 1 case where the complainant was a female to male transsexual. 8 of the 9 sex discrimination complaints were held to be justified. The remaining complaint, based on allegations of sexual harassment in employment and retaliation for filing a complaint, was dismissed. In the following case the remedy included an award for damages for injury to dignity, feelings and self-respect that is the highest awarded by the Tribunal to date:

> The complainant was sexually harassed while working with the respondent at his restaurant and her employment was terminated on a discriminatory basis. Thereafter, the respondent spread groundless rumours that the complainant was having an extra-marital affair as a cover for the real reason for her termination, and to punish her and silence her about the sexual harassment. The complainant and her family were severely embarrassed in a small community, the rumours strained her traditional marriage and she suffered debilitating health problems. She was awarded $10,000 for extensive and prolonged injury to her dignity, feelings and self-respect (*Gill v. Grammy's Place Restaurant and Bakery Ltd.*, 2003 BCHRT 88).

Disability Discrimination

9 final decisions concerned complaints of discrimination based on disability including physical disability (5 cases), mental disability (2 cases), and physical and/or mental disability (2 cases). Conditions recognized as disabilities included heart disease, post-traumatic stress disorder, deafness, asthma and allergies, depression, mental illness, medical conditions limiting mobility, and a combination of conditions resulting in physical limitations.

6 of the 9 complaints were held to be justified: 1 of the 2 mental disability complaints; 4 of the 5 physical disability complaints, and 1 of the 2 mental and/or physical disability complaints. 1 complaint was dismissed because the complainant's injuries did not constitute a disability within the meaning of the *Code*. In the 2 other dismissed complaints, the Tribunal found a

prima facie case of discrimination, but decided that the respondent employer had accommodated the complainant to the point of undue hardship. For example:

> An employer must reasonably accommodate an employee's disability where the employee requires accommodation to perform the requirements of their job or to otherwise maintain their employment, and where the employer is aware or ought reasonably to have been aware of the employee's disability and need for accommodation. The Tribunal found that the employer proved that it had been actively engaged in finding alternative work for the complainant within government, including a brief return to his former job at his request, to the point of undue hardship (*Gardiner v. Ministry of the Attorney General*, 2003 BCHRT 41).

Of the 6 disability cases that were found to be justified, 2 were in the employment context, 3 involved services, and 1 involved tenancy. For example:

> In the employment context, a long serving employee was terminated after he developed major depression. The Tribunal rejected the employer's argument that it could dismiss the complainant once he was medically fit to return to work without violating the *Code*. The Tribunal determined that, although the company was involved in a downsizing process, the complainant's disability was a factor in the loss of his job. In reaching this conclusion, the Tribunal took into account the fact that the company decided to terminate the complainant's employment while he was away from work on medical leave, and that the employer was influenced by the complainant's performance which was affected by his disability (*Morris v. BC Rail*, 2003 BCHRT 14).
>
> In a services context, the Tribunal held that a profoundly deaf complainant was discriminated against on the basis of a physical disability when the Superintendent of Motor Vehicles required him to pay for a specialized individual assessment before obtaining a class 4 driver's licence (*Hussey v. B.C. (Min. of Public Safety and Solicitor General)*, 2003 BCHRT 76).

Age Discrimination

1 of 2 age discrimination complaints was held to be justified:

> The Tribunal found that a 63 year old man was laid off of his pipeline job in part because his foreman wanted a "young man's crew" (*Comeau v. Cote and Murphy Pipeline Inc.*, 2003 BCHRT 32).

Discrimination based on Lawful Source of Income

The 1 complaint heard respecting this ground of discrimination was found to be justified:

> The respondents were held to have discriminated against the complainant when they refused to rent an apartment to him after learning that he lived on a disability pension (*Tanner v. Vlake*, 2003 BCHRT 36).

Discrimination based on Race, Colour, Ancestry and/or Place of Origin

The other grounds raised in the final decisions were race, colour, ancestry, and place of origin. The complainants in these cases were a

woman from the Philippines, a Sikh woman of East Indian descent, a woman from Yemen, and an East Indian man.

1 of the 4 complaints in these areas was held to be justified:

> The complainant worked at an open pit mine where persistent racial slurs were made outside of his presence, culminating in one incident where racial insults were said to him directly. The Tribunal held that this produced a poisoned work environment (*Pillai v. Lafarge Canada Inc.*, 2003 BCHRT 26).

DISCRIMINATION BASED ON SEXUAL ORIENTATION, RELIGION, POLITICAL BELIEF, MARITAL STATUS, FAMILY STATUS AND CRIMINAL CONVICTION

There were no final decisions in 2003/2004 in respect of the above noted grounds.

JUDICIAL REVIEW

The Tribunal is subject to the supervision of the superior courts in respect of its decision-making. There is no right to appeal Tribunal decisions, but a party who believes that the Tribunal may have erred in the exercise of its decision-making powers may seek judicial review in the Supreme Court of British Columbia. In the 2003/2003 fiscal year, the Supreme Court released 5 decisions on applications for judicial review of Tribunal decisions. The Court of Appeal of B.C. released 1 decision on an appeal of a Supreme Court decision.

Of particular note are the decisions in *Vancouver Rape Relief Society v. Nixon*, 2003 BCSC 1936, *Reid et al. v. Vancouver (City) et al.*, 2003 BCSC 1348 and *The Minister of Health Planning et al. v. The British Columbia Human Rights Tribunal et al.*, 2003 BCSC 1112.

In *Vancouver Rape Relief Society* the court held that the Tribunal was too restrictive in its interpretation and application of the group rights exemption under s. 41 of the *Code*, such that a non-profit society offering services to women abused by men was permitted to prefer female counsellors born female over a post-operative male to female transsexual. The court also held that the correct legal test for discrimination in employment under s. 13 of the *Code* is the same as that used to determine discrimination under s. 15(1) of the *Charter of Rights and Freedoms* as articulated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.R. 497. The court's decision is currently under appeal to the Court of Appeal.

In *Reid* female communications operators working for the Vancouver Police Department alleged that they were paid less than male communications operators doing substantially the same work for the Vancouver Fire Department. The Tribunal found no discrimination in wages or employment on the basis of sex, in part because of a finding that the two groups of communications operators had different employers. On review, the court decided that the Tribunal had given an overly narrow interpretation of the term "employer" in s. 12 of the *Code*. The court ordered the Tribunal to reconsider the matter with respect to wage discrimination but dismissed the petition with respect to discrimination in employment. This decision is also currently under appeal to the Court of Appeal.

In *Minister of Health Planning* the court found that the Tribunal did not have jurisdiction under s. 37(2)(c) of the *Code* to order the Director of Vital Statistics to amend the birth registration form in a specific way to allow a non-biological (same sex) parent to register as a co-parent. The proper remedy was for the Tribunal to order the Director to cease the contravention and refrain from committing the same or similar contravention in the future, thus leaving it to the Director to choose how to correct the discriminatory acts.

SPECIAL PROGRAMS

It is recognized in s. 42(3) of the *Code* that treating everyone the same does not necessarily promote true equality and the elimination of discrimination. That section provides for special programs that require treating individuals or groups differently in order to recognize the reality of their diverse characteristics and their unique needs.

A special program is any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups. One type of special program is an employment equity program which is designed to ameliorate the conditions of individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex and which achieves or is likely to achieve that objective.

A special program which is approved by the chair of the Tribunal is deemed not to be discriminatory under the *Code* for the duration of the approval. Special programs may be undertaken without Tribunal approval, but will not insulate the program provider from a human rights complaint in respect of the program.

The Tribunal has issued a policy on special programs outlining in detail the requirements for obtaining approval for a special program. All approvals are time-limited, generally between 6 months to 5 years in duration, with employment equity programs usually being several years long. Periodic reporting may be a condition of approval. On expiry of an approval, a program provider may seek renewal of the approval by application.

The power to approve special programs is new to the Tribunal, having formerly been exercised by the Commission. Special programs approved by the Commission and still ongoing were transferred to the Tribunal. The Tribunal communicated with program holders about the legislative change in responsibility for special programs and advised what would be required of them by the Tribunal. In the last year, the chair approved 7 new special programs and 9 renewals. Organizations that seek special programs approval have included universities, colleges and school districts, ministries of government and Crown corporations, societies and associations providing community and health services (including transition houses), sports associations and businesses.

Tribunal Members

Heather M. MacNaughton, Chair

Ms. MacNaughton was appointed as the chair of the Tribunal on August 1, 2000. She holds both a Bachelor of Law (1982) and Master's of Law (1998) from Osgoode Hall Law School and a Bachelor of Arts (with distinction) from Brock University (1979). Her Master's work focused on the Litigation Process and Alternative Dispute Resolution.

Prior to her appointment to the Tribunal, Ms. MacNaughton chaired both the Ontario Human Rights Board of Inquiry and the Ontario Pay Equity Hearings Tribunal.

Ms. MacNaughton left private practice in 1995 to become a Vice Chair of the Ontario Human Rights Board of Inquiry, the Pay Equity Hearings Tribunal and the Employment Equity Tribunal. Prior to that she had been a partner with the firm of Lang Michener Lawrence & Shaw practising in the areas of Labour, Employment, Human Rights, Administrative Law and Civil Litigation.

J.A. (Tonie) Beharrell, Member

Ms. Beharrell was appointed as a full-time member of the Tribunal on December 2, 2002. She holds a law degree from the University of British Columbia (1997) and a Bachelor of Arts from Simon Fraser University (1994).

Prior to joining the Tribunal, Ms. Beharrell was an Associate at the firm of Heenan Blaikie, LLP, practising in the areas of Labour, Employment, Human Rights, and Administrative Law.

Barbara Humphreys, Member

Ms. Humphreys was appointed as a full-time member of the Tribunal in 1997. She holds a law degree from the University of Victoria (1984) and a Bachelor of Arts from Sir George Williams University (1969).

Ms. Humphreys joined the B.C. Council of Human Rights in 1990. She was actively involved in the transition from the former B.C. Council of Human Rights to the Human Rights Tribunal.

Prior to joining the B.C. Council of Human Rights, Ms. Humphreys was an Ombudsman Officer for the Office of the Ombudsman.

Barbara J. Junker, Member

Ms. Junker was appointed as a full-time member of the Tribunal on July 28, 2003. She holds a Bachelor of Commerce (1977) from the University of British Columbia.

Prior to joining the Tribunal, Ms. Junker spent nine years as a Vice-Chair at the Labour Relations Board. Prior to that, Ms. Junker worked in the healthcare industry as an employer representative in Labour and Employee Relations.

Lindsay Lyster, Member

Ms. Lyster was appointed as a full-time member of the Tribunal on September 30, 2002. She holds a law degree from the University of British Columbia (1991) and a Bachelor of Arts (with distinction) from the University of Victoria (1987).

Prior to joining the Tribunal, Ms. Lyster was Policy Director of the B.C. Civil Liberties Association. Prior to that she was an Adjunct Professor, Faculty of Law, University of British Columbia, teaching in the area of Canadian Constitutional Law. Prior to that she was an Associate at the firm of Heenan Blaikie practising in the areas of Labour, Human Rights, Constitutional Law, Administrative Law and Employment Law.

Diane MacLean, Member

Ms. MacLean was appointed as a full-time member of the Tribunal on July 28, 2003. She holds a Bachelor of Arts (1972) and a Master's of Arts (1980) in Economics from Simon Fraser University. She completed her law degree at the University of British Columbia in 1985.

For several years she practised law, taught university courses, and worked as an economic and legal researcher and writer.

Ms. MacLean began working for the Ministry of Labour in 1993, first as a Policy Specialist at the Pension Standards Branch and later as an Officer at the Employment Standards Branch.

Just prior to her appointment to the Tribunal, Ms. MacLean was a Vice-Chair at the Workers' Compensation Appeal Tribunal.

Ana Mohammed, Member

Ms. Mohammed was appointed as a full-time member of the Tribunal on March 1, 2001. She holds a law degree from the University of Western Ontario (1990) and an Honours Bachelor of Arts degree from the University of Manitoba (1986).

Prior to joining the Tribunal, Ms. Mohammed was pursuing her Master's of Law degree at the University of British Columbia in the areas of Human Rights and Employment Law, and was a Human Rights Consultant in British Columbia. Prior to that, she practised law for five years in Toronto, primarily in the areas of Labour and Employment (with an emphasis on Human Rights) and Criminal Law.

Kurt Neuenfeldt, Member

Mr. Neuenfeldt was appointed as a full-time member of the Tribunal on January 6, 2003. He holds a law degree from the University of British Columbia (1978) and a Bachelor of Arts degree from the University of Wisconsin (1972).

Before joining the Tribunal, Mr. Neuenfeldt was a member of the Immigration and Refugee Board of Canada for over nine years. Prior to that, he was in private practice in the Vancouver area. For several years, Mr. Neuenfeldt was with the Legal Services Society of BC. While with the Society, he held a range of positions including Staff Lawyer, General Counsel and Director of Client Services.

Abraham Okazaki, Member

Mr. Okazaki was appointed as a full-time member of the Tribunal on July 28, 2003. He holds degrees in law (University of British Columbia) and arts (University of Alberta), and has been a practising member of the Law Society of British Columbia since 1974.

His law practice focused on corporate and commercial matters, but also included Civil and Criminal Litigation. Mr. Okazaki also has experience as an executive and educator in both the private and public sectors.

Just prior to joining the Tribunal, Mr. Okazaki was a Vice-Chair of the Workers' Compensation Review Board and then a Vice-Chair of its successor, the Workers' Compensation Appeal Tribunal.

Carol Roberts, Part-Time Member

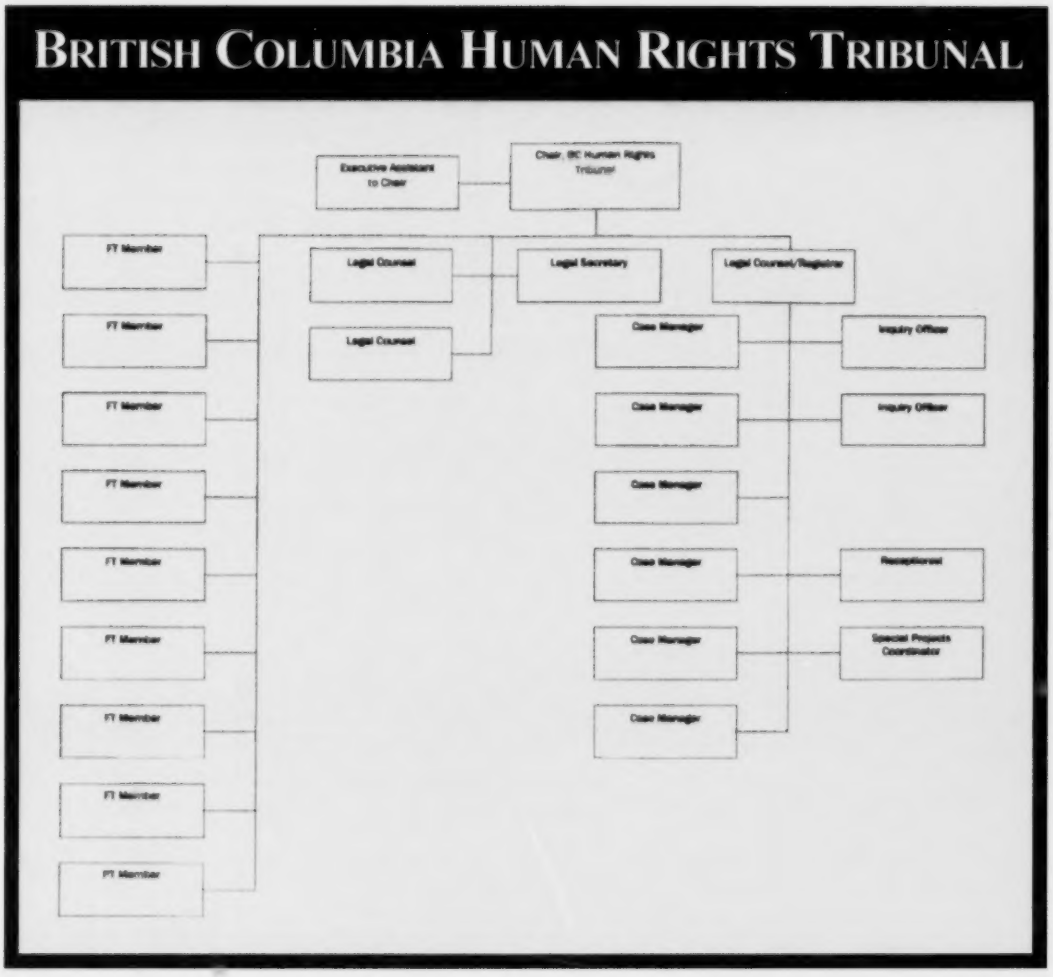
Ms. Roberts was appointed as a part-time member of the Tribunal in 1999. She holds a law degree from the University of Calgary (1985). She has a Certificate from the International Institute of Human Rights in Strasbourg (1990) and attended the Canadian Human Rights Foundation Summer School on Human Rights (1984).

Ms. Roberts practised law in the Northwest Territories from 1985 through 1991.

Ms. Roberts was the former Conflict of Interest Commissioner for the Northwest Territories and serves as an adjudicator for the BC Employment Standards Tribunal. From 1992 to date, she has served as a member, or arbitrator, on a number of provincial and federal agencies, boards and commissions.

Organizational Chart

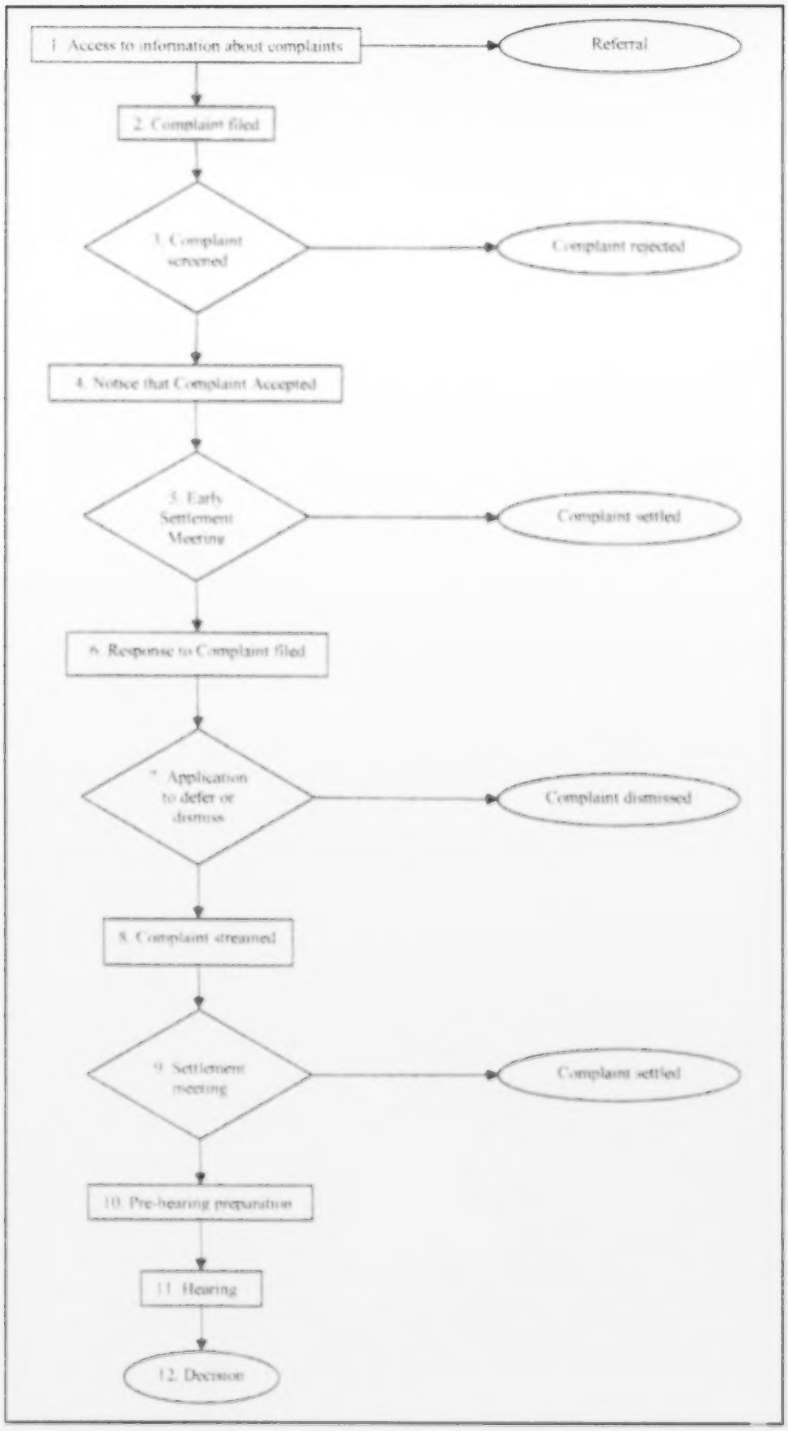
British Columbia Human Rights Tribunal



Organizational Chart

British Columbia Human Rights Tribunal

Complaint Flow Chart



Summary of Steps in the Complaint Procedure

1. Access to information about complaints

The Tribunal has two inquiry officers who give callers basic information about human rights protection under the *Code*, the complaint process and other organizations providing assistance in human rights matters. If the call is not about a human right matter, the inquiry officers may refer the caller to another agency. Complaint forms, guides and information sheets are available at the Tribunal, on its Web site, at government agents' offices, and at the Human Rights Clinic and other organizations.

2. Complaint filed

The first step in the complaint process is filing a complaint form with the Tribunal by email, mail, fax, or hand delivery.

3. Complaint screened

When a complaint is filed, a case manager reviews the complaint form to ensure that it is complete, apparently within the jurisdiction of the Tribunal, and filed within the 6-month time limit.

If the complaint form is not complete, the case manager will outline the deficiency and give the complainant a limited time to properly complete it.

If is clear that the complaint does not involve a BC matter or a human rights matter covered by the Code, the case manager will recommend to the chair that the complaint be rejected.

If it appears that the complaint was filed after the 6-month time limit, the case manager will get input from the parties about whether it is in the public interest to accept the complaint and whether anyone would be substantially prejudiced by the delay in filing. A Tribunal member will decide whether to accept the complaint.

4. Notice that complaint accepted

After screening a complaint, the Tribunal notifies the parties that the complaint has been accepted.

5. Early settlement meeting option

The parties can choose to meet with a mediator from the Tribunal who will assist them to resolve the complaint before any further steps in the complaint process are taken. Many complaints resolve at this stage.

6. Response to complaint filed

If the parties do settle or do not want an early settlement meeting, the respondent files a response to the complaint form and may also file an application to defer or dismiss the complaint.

7. Applications to defer or dismiss

If a respondent applies to have the complaint deferred or dismissed, the Tribunal will get input from the parties and a Tribunal member will decide the application. Complaints may be deferred if there is another proceeding capable of appropriately dealing with the substance of the complaint. Complaints may be dismissed for the reasons set out under s. 27(1) of the *Code*.

8. Complaint streamed

Once a response to the complaint is filed and screened, the Tribunal decides whether the standard stream under the Tribunal's *Rules* is appropriate, or if the process will be case-managed by a Tribunal member. Most complaints follow the standard process, with the case-managed stream being used only for complaints that are particularly complex or that have other special characteristics.

9. Settlement meeting

After the complaint is streamed, the parties are given another opportunity to attend a settlement meeting with a Tribunal mediator.

10. Pre-hearing preparation

If the complaint has not settled, the parties are required to prepare for the hearing, by exchanging relevant documents, witness lists, and positions on remedy. There is also a pre-hearing telephone conference to ensure that the parties are prepared for the hearing.

11. Hearing

Hearings are held before a member of the Tribunal or a panel of three members in exceptional cases. Hearings are conducted in person and are open to the public. The parties provide evidence through witnesses, documents and other items. Each party also has the opportunity to challenge the other party's evidence and to make arguments supporting their positions.

12. Decision

Based on the evidence, the arguments and the relevant law, a Tribunal member or panel decides whether the complainant has proven that discrimination occurred and, if so, whether the respondent has proven a defence to the discrimination. If the member or panel decides that the complaint is not justified, the complaint is dismissed. If the complaint is justified, the member or panel makes orders to remedy the discrimination.

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